March 14, 2014

ATTACHMENT TO NOTICE OF EXEMPTION Suction Dredging; Second Readoption of Emergency Regulation

The California Department of Fish and Wildlife (CDFW), by and through its Director, has taken final action under the Fish and Game Code and the Administrative Procedure Act (APA) with respect to the project mentioned above. CDFW initially adopted the proposed definition of "suction dredging" (Cal. Code Regs., tit. 1, § 52, and tit. 14, § 228, subd. (a)) through emergency rulemaking effective June 28, 2013. (Cal. Reg. Notice Register 2013, No. 28-Z, pp. 1034-1035.) OAL approved CDFW's first readoption effective December 16, 2013. On February 14, 2014, CDFW initiated regular noticed rulemaking to make permanent the now in-effect and recently readopted regulatory definition of suction dredging. A public meeting/hearing will be held on April 1, 2014. On March 7, 2014, CDFW provided notice of a second readoption of emergency regulatory action and on March 14, 2014, CDFW filed with OAL a request for a second readoption. This Notice of Exemption pertains to that second readoption, which will preserve the existing status quo as a matter of law and on the ground in anticipation of the existing definition becoming permanent through the regular noticed rulemaking by CDFW pursuant to the APA.

In taking final action for purposes of the California Environmental Quality Act (CEQA), CDFW readopted for a second time the regulatory definition relying on the statutory exemption for emergencies. (Pub. Resources Code, § 21080, subd. (b)(4); CEQA Guidelines, § 15269, subd. (c).)¹ CDFW also relied on two categorical exemptions relevant to government agency actions to protect natural resources and the environment. (*Id.*, §§ 15307, 15308.) Each exemption as relevant to the second readoption is discussed below.

Statutory Exemption for Emergencies

For purposes of CEQA, "'Emergency' means a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services. 'Emergency' includes such occurrences as fire, flood, earthquake, or other soil or geologic movements, as well as such occurrences as riot, accident, or sabotage." (Pub. Resources Code, § 21060.3; see also CEQA Guidelines, § 15359.) By statute, specific

¹ The "CEQA Guidelines" are found in Title 14 of the California Code of Regulations, commencing with section 15000.

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actions necessary to "prevent or mitigate an emergency" are exempt from CEQA. (Pub. Resources Code, § 21080, subd. (b)(4); see also CEQA Guidelines, § 15269, subd. (c).) The statutory exemption for emergencies applies to events that involve clear and immediate danger, and demand immediate action. (See, e.g., *CalBeach Advocates v. City of Solano Beach* (2002) 103 Cal.App.4th 529.)

CDFW has determined that a second readoption of the existing definition of suction dredging is an action properly subject to the statutory exemption for emergencies. Substantial evidence supporting that determination is set forth in detail in the APA rulemaking records for the initial adoption of the now in-effect definition by emergency action in June 2013 (OAL File No. 2013-0618-02E) and for the first readoption effective December 16, 2013 (OAL File No. 2013-1216-01EE.) For purposes of the second readoption, CDFW incorporates the prior rulemaking files by reference in their entirety. (Cal. Code Regs., tit. 1, § 52, subd. (c).) Further support for the emergency finding is detailed in the Subsequent Environmental Impact Report (SCH No. 2009112005) certified by CDFW in March 2012; and in the April 29, 2013 declaration of Mark Stopher, and April 30, 2013 declarations of Stafford Lehr and Elizabeth Haven, all filed on or about the same days by CDFW in San Bernardino County Superior Court. (*Suction Dredge Mining Cases*, Sup.Ct. San Bernardino County, Judicial Council Proceeding No. JCPRS4720.)

In short, use of any vacuum or suction dredge equipment for instream mining purposes is currently prohibited by statute throughout California. (Fish & G. Code, §§ 5653, subd. (a), 5653.1, subd. (b).) Use of the equipment is prohibited, among other reasons, because related instream mining activities are known to cause adverse environmental, cultural, and public health impacts. CDFW took emergency action in June 2013 to close a regulatory "loophole" being exploited by certain members of the mining community to avoid regulation under Fish and Game Code sections 5653 and 5653.1, specifically. CDFW has readopted the existing definition to reduce the risk that the "loophole" will reappear prior to the completion of regular rulemaking.

CDFW also notes that current low flow conditions in streams throughout California would exacerbate the adverse effects of suction dredge mining activities absent an extension of the existing emergency regulations. 2013 closed as the driest calendar year on record for the state. Since then, drought conditions have intensified statewide. Governor Jerry Brown declared a Drought State of Emergency on January 17, 2014. In response to historically low stream flows, the California Fish and Game Commission adopted emergency fishing closures on February 5, 2014 to protect salmon and steelhead populations from angling related mortality. The resumption of loophole mining would constitute an additional, unnecessary threat to these populations.

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Categorical Exemptions to Protect Natural Resources and the Environment

In enacting a second readoption of the now in-effect regulatory definition of suction dredging, CDFW also relied for purposes of CEQA on the Class 7 and 8 categorical exemptions. In general, both exemptions apply to agency actions authorized by statute to protect natural resources and the environment. (CEQA Guidelines, §§ 15307, 15308.) As the state's designated trustee agency for fish and wildlife, CDFW has specific statutory authority in the present case to readopt the definition to ensure the regulation is consistent with controlling statute. (Fish & G. Code, § 5653.9.)

A second readoption of the existing regulatory definition will ensure that related deleterious effects to fish do not occur. (*Id.*, § 5653, subd. (b).) A second readoption will also have the incidental benefit of protecting other wildlife, important natural and cultural resources, and the environment generally. CDFW's readoption, as a result, is the proper subject of CEQA's Class 7 and 8 categorical exemptions.